Supreme Court, U.S.
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No. 91-1668

In The

Supreme Court of the United States

LOUIS A. LaRAIA,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE:

Petitioner, Louis A. LaRaia, was charged with cruelty to animals under section 5511(a) of The Pennsylvania Crimes Code (18P.S. section 5511(a)) for shooting and killing a coon dog. After jury trial on January 12 and 13, 1987, petitioner was found guilty. After his post trial motions were denied on July 16, 1987, he was sentenced to probation and fine. Upon a direct appeal to the Pennsylvania Superior Court the judgment of sentence was affirmed by a memorandum opinion, dated December 22, 1988, which was published at *387 Pa. Super. 649, 559 A.2d 963.* An application for reargument was denied on February 23, 1989. Petitioner then entered a petition for allowance of appeal to the Pennsylvania Supreme Court, said petition was denied on March 19, 1990, and published at *575 A. 2d 563.* A motion for reconsideration and request for change of venue was denied by the Supreme Court on May 8, 1990.

Petitioner then filed a petition for a Writ of Certiorari to this court at No. 90-213 in which petitioner sought review of the memorandum opinion of the Pa. Superior Court dated December 22, 1988. By an order of April 1, 1991, this court remanded the case to the Superior Court for further consideration in light of *Powers vs. Ohio, 111 S. Ct. 1364, 499 US.* The Superior Court of Pennsylvania by a memorandum opinion dated May 24, 1991, affirmed the judgment of sentence. On July 1991 an application for reargument was denied by the Superior Court. A petition for allowance of appeal was denied by the Supreme Court of Pennsylvania on January 8, 1992.

This petition for Writ of Certiorari folllowed.

II. STATEMENT OF FACTS:

In his prior petition at No. 90-213 petitioner raised three issues. One issue relevant here involved removal of two black venire from the panel. It was upon this issue that this court remanded the case for further reconsideration in light of *Powers vs. Ohio, 111 S. Ct. 1364, 113 L. Ed. 2d 411*, even though the petitioner himself is white and the removed venirepersons were black. It was because this court in Powers, Supra, extended the principal in *Batson vs. Kentucky, 106 S. Ct. 1712, 90 L. Ed. 2d 69* and ruled that under equal protection clause defendant has standing to object to race based exclusions of jurors through peremptory challenges whether or not defendant and excluded jurors share same race.

After the remand the Superior Court of Pennsylvania, by a memorandum opinion of May 24, 1991, denied the relief requested by the petitioner and affirmed the judgment of sentence. The Superior Court in its opinion ruled that there was not sufficient information provided by the petitioner on the record to determine whether he had a prima facia case made out as required by *Batson*, supra, (App. 11, 12). The court also found that the prosecutor offered race neutral explanation which was accepted by the trial court, App. 9.

Petitioner now complains that the Superior Court "disobeyed" this court's remand order by concluding that petitioner waived the issue, and insists that the case should have been either remanded for new trial or the judgment of sentence be over turned. The Commonwealth disagrees.

III. REASONS WHY THE PETITION SHOULD BE DENIED:

(a) In the *Powers vs. Ohio*, Supra, this court ruled that to raise a *Batson*, Supra, challenge, a defendant need not be of the same race group as the jurors whose exclusion he has challenged. The court, therefore, said that a white defendant may object the exclusion of black venireperson, when it was caused by prosecutor's peremtories aimed at race discrimination. In *Batson*, Supra, however, this court imposed the burden on the defendant to prove the existence of purposeful discrimination on the part of the prosecutor. In *Batson*, Supra, this court ruled that defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda vs. Partida, supra, 430 U.S., at 494 97 S. Ct., at 1280*, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery vs. Georgia, 345 U.S., at 562, 73 S. CT., at 892*. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raised the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose, *Batson, supra, 106 S. Ct. at 1723.* It went on to say that if a defendant makes a prima facie showing of a discrimination, the burden then shifts to the prosecution to justify his/her decision to strike particular venireperson. The prosecutor must then articulate a race neutral explanation in support of his/her denial of the allegation of exercise of peremtories on basis of race. Finally, the court advised, that the trial judge must make the ultimate determination of whether the defendant has established purposeful discrimination, *Batson, supra at 106 S. Ct. at 1724,* also see *Hernandez vs. New York, 111 S. Ct. 1859, 114 L. Ed. 2d 345.*

Under *Powers*, supra, the showing of the first *Batson* condition is no more required when the court granted standing to a defendant to object race based exclusion of a juror whether or not defendant and the excluded juror share the same race. As to remaining requirements the *Batson* court explained that in deciding whether defendant has made the requisite showing, the trial court should consider all *relevant circumstances*, (emphasis added). For example, a pattern of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustra-

-tive. We have confidence that trial judges, experienced in supervising voir dire will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black juror, *Batson, supra, 106 S. Ct. at 1723.*

In the instant case the Superior Court ruled that the record is wholly devoid of any criteria with which to make determination of whether appellant has established a prima facie case, (App. 11, 12). Further more the record does not show what questions during the voir dire were asked by the prosecutor. No facts are shown on the record as to the pattern of strikes against black jurors and any other race. As to evaluate the circumstances in which the exclusion of the two black venirepersons was exercised, the Superior Court could not find any information in the record that would shed light of the composition of the venire panel, how many blacks were on the panel, how many blacks were struck, the ages and occupations of members on the petit jury, the ages and occupations of white jurors who were struck by the Commonwealth, (App 12, 13). Petitioner, therefore, failed to provide pertinent facts and important information with which the Superior Court could have conducted a meaningful review to evaluate whether petitioner established a prima facie showing.

It is a fundamental rule of procedure that an appellate court may only consider facts which have been duly certified in record on appeal, *Commonwealth vs. Buehl, 403 Pa. Super. 143, 588 A.2d 522, Commonwealth vs. Lowry, 385 Pa. Super. 236, 560 A.2d 781,* also see *In Re: Capital Cities/ABC, Inc; 913 F.2d 89.* It is also held that cases must be decided on basis of facts *or* record and not on allegations of facts in party's appeal brief, *Commonwealth vs. Nelson, 389 Pa. Super. 417, 567 A.2d 673.*

The record attached to the petition, even if admitted, does not support petitioner's cause. Instead it refutes petitioner's claim of purposeful discrimination. A plain review of the record (App 42-60) reveals no questions were asked by the prosecutor which could be linked to his intention of exercising race discrimation.

Under the circumstances, the Superior Court of Pennsylvania properly denied petitioner's request for relief and affirmed the judgment of sentence.

(b). As the Superior Court mentioned in its opinion (App. 9) that the trial court denied petitioner's objection of exclusion of two black venirepersons for following reasons:

(i) The trial court applied *Batson*, supra, rule because petitioner was white and was objecting exclusion of two black jurors.

(ii) The trial court also considered race neutral explanation offered by the prosecutor when he stated that he did not even realize he had removed black venire members as he did not look at the panel while exercising peremptory challenges. He only looked at the book (the papers containing information regarding the age, occupation, etc. of the venirepersons), (Footnote at App. 9). From the record the Superior Court also found that the Commonwealth stated that the two venirepersons were struck because of their age and the fact that they were housewives, (Footnote at App. 13).

It is clear that the trial court denied petitioner's objection on the basis of *Batson* opinion then the applicable rule. The *Power* opinion however granted standing to petitioner to object race based exclusion of jurors even if the race of

petitioner and excluded jurors was not same. But under *Batson* mere standing to object is not equal to establishing a prima facie case. To show prima facie case petitioner has to show that prosecutor exercised peremptories for purposeful race discrimination. This is what exactly the Superior Court ruled that petitioner failed to show any "facts or any other relevant circumstances," which would raise an inference or show pattern that the prosecutor used such practice to exclude jurors on account of the race.

Just for the arguments, let us presume that petitioner was able to make a showing of prima facie case. In that event the next step was for the prosecutor to offer race neutral explanation, and finally the trial court has to rule on the ultimate question of intentional race discrimination. In accordance with the opinion entered by the Superior Court the trial court precisely applied the above noted procedure and found that prosecutor's explanation was racially neutral.

The petitioner, however, contends that the trial court should not have believed prosecutor's explanation. In support he has enclosed two affidavits to show that prosecutor in fact saw the black jurors. The affidavits do not present factually accurate picture. It is true when the panel had entered the courtroom, the prosecutor would have been able to see the members of the panel. But he did not know their numbers, names or other particulars for their identities. From the prosecutor's explanation it can be reasonably inferred that once the panel was seated, prosecutor introduced himself, defense attorney, witness and asked a few questions, then he sat down at the prosecution table and began reviewing the book which contained all the information about the panel members. That is where the prosecutor is claiming that he made his final selection and did not look at the panel. From his explanation it is clear that he did

not want to pick housewives of advance age, for housewives of advance age, in his judgement, generally do not like people who hunt with coon dogs. It could be further inferred from prosecutor's explanation that in his judgement housewives do not like hunting. The trial court was therefore, justified to find prosecutor's explanation credible.

The issue of credibility of race neutral explanation was presented in *Hernandez vs. New York, 111 S. Ct. 1859, 114 L. Ed.2d 395.* In that case this court pronounced that at the appellate level, the issue is not whether the prosecutor's stated reason was in fact racially neutral. It is rather, whether, accepting for the truth of the reason, such reason violates equal protection clause as a matter of law. The court further stated that race neutral explanation means an explanation based on something other than the race of the juror. The inquiry involves the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in prosecutor's explanation, the reason offered will be deemed race neutral. The court ruled that issues involving *Batson* will be treated under deferential clearly erroneous standard. The court said that *Batson's* treatment of intent to discriminate is a pure issue of fact, subject to review under a deferential standard which is consistent with treatment of this issue in other equal protection cases. The court noted that if the trial court believes the prosecutor's non racial justification, and finding is not clearly erroneous, that is the end of the matter. In other words, in absence of clear error, trial court's acceptance of the race neutral explanation shall not be disturbed, *Hernandez, supra.*

CONCLUSION

In view of the foregoing, it is respectfully prayed that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is certified that five true copies of foregoing briefs were served upon the following by first class U.S. mail on the 20th of July, 1992 at the address indicated below:

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